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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 372

STATE LODGE OF MICHIGAN, FRATERNAL ORDER OF POLICE, by its President, Henry Mida, Lodge No. 115 of the State Lodge, HOWARD HEINE and BERNARD L. DUGGAN,
Plaintiffs, Appellants and Petitioners,

vs.

CITY OF DETROIT, a Municipal Corporation, EDWARD J. JEFFRIES, Mayor of the City of Detroit, JOHN H. WITHERSPOON, Commissioner of Police of the City of Detroit, County of Wayne and State of Michigan, LOUIS L. BERG, Superintendent of Police of the City of Detroit, County of Wayne and State of Michigan,
Defendants, Appellees and Respondents

ANSWER TO PETITION FOR WRIT OF CERTIORARI

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ANSWER TO PETITION FOR WRIT OF CERTIORARI

I.

STATEMENT OF FACTS

To the Honorable Supreme Court of the United States:

Respondents, by their attorney, Nathaniel H. Goldstick, Assistant Corporation Counsel, respectfully show unto the court as follows:

Preliminary Statement

That Nathaniel H. Goldstick, Assistant Corporation Counsel of the City of Detroit, has had principal charge of this litigation and files this answer on behalf of the City of Detroit, a Municipal Corporation, and the remainder of the respondents.

That this cause was tried on issues of fact and law before the Honorable Frank Ferguson, Circuit Judge for Wayne County, Michigan. Many days devoted to the taking of proofs were had before Judge Harry B. Keidan, who conducted the hearing on the order to show cause why a temporary injunction should not issue (Exhibit Vol I, pp. 64 through 401), and before Judge Frank Ferguson, who tried the case on the merits (R. 77 through 507). Unlike most of the reported cases decided on the pleadings, sustaining the validity of similar orders prohibiting membership in organizations, this case was decided on the merits. No mention is made in the petition filed by the petitioners of the voluminous proofs adduced at the Police Trial Board hearings (Exhibits 128, 129, 130; R. 377); the hearing before Judge Keidan, covering a period of five days (Exhibit Vol I, pp. 64-401), or the trial before Judge Ferguson, that took several weeks, which conclusively showed that affiliation by Detroit police officers with the Fraternal Order of Police is hostile to public welfare and contrary to good government. In answering the petition for writ of certiorari filed herein, we, therefore, refer to proofs in the case together with the reasons given by the Police Department heads for the promulgation of the order prohibiting membership and the opinions of Judges Keidan and Ferguson, which we append to this answer for the convenience of the court.

1. Statement of Matter Involved

1. Answering paragraph one, these respondents admit that the petitioner, the State Lodge of Michigan Fraternal Order of Police is organized and chartered as a Michigan non-profit corporation, but these respondents deny that at the time of the filing of the petition Victory Lodge No. 115 Fraternal Order of Police was composed of members of the Detroit police force, and deny that any Detroit police officers are now members thereof. These respondents admit that Howard Heine and Bernard L. Duggan were police officers of the City of Detroit.

2. Answering paragraph two, these respondents admit that the City of Detroit is a municipal corporation; that Edward J. Jeffries is Mayor; that John H. Witherspoon was Commissioner of Police and Louis L. Berg was Superintendent of Police.

3. Answering paragraph three, these respondents deny that at the time the controversy involved in this cause arose that the Fraternal Order of Police had a National history of twenty-eight years, as set forth in said paragraph, but on the contrary aver that much of the history of the organization and the experience of other communities, as shown by the record in this cause, demonstrated that the organization had engaged in activities that were contrary to efficient police work. That the Michigan Supreme Court concluded from the proofs: "That the existence of plaintiff organization within the law-enforcement body of a municipality is contrary to public policy" (See *Fraternal Order of Police v. Lansing Board of Police & Fire Commissioners,* 306 Mich. 68, at p. 80; *State Lodge of Michigan v. City of Detroit, et al.,* 318 Mich. 182, at p. 188).

4. Answering paragraph four, these respondents deny that police officials are high in their praise of the organ-

ization and deny that membership in this organization builds morale and makes for better police work, but on the contrary these respondents aver that the proofs in this cause conclusively show that the organization is engaged in many practices that were and are inimical to efficient and proper police work. That among the activities and practices condemned by the Police Commissioner were:

(1) The indiscriminate sale to outsiders of honorary and associate memberships, together with automobile emblems (Exhibit Vol. II, pp. 41-42; Exhibit Vol. I, p. 252).

(2) The right of a police officer to retain his membership, even though discharged from the Police Department by reason of bribery or other causes (R. 412; Exhibit Vol. I, pp. 221-222-368).

(3) Questionable money raising campaigns through high pressure solicitations with the professional promoter getting fifty per-cent of the proceeds (Exhibit Vol. I, pp. 249-251; Exhibit 38, p. 9; Exhibit 47, p. 15; Exhibit 106, p. 29; Exhibit 107-D, p. 31; Exhibit 108, p. 33; Exhibit 109-A, p. 35; Exhibit 110-A, p. 37; Exhibit 111-A, p. 39).

(4) The activities of petitioner Heine, who on January 30th, 1945, told the Commissioner that if the organization was barred he would resign from it and who went directly from the Commissioner's office and conducted the organization and initiation meeting and had himself elected President (405-406).

(5) The activities of petitioner Duggan, who left his post without authority or permission to be elected Secretary of the new lodge and who insisted that he would be the guinea pig in a test case (R. 395; Exhibit 130, Ex. Vol. II, pp. 11-46).

(6) The assurance given by Heine to Officer Galahn that he would get the approval of his superiors, resulting in Galahn's acceptance of membership when he, Heine, knew no such assurance had been given (Exhibit 128, pp. 99-104).

(7) The circulation of highly inflammatory and slanderous handbills and printed matter among the police (See Vol. I, Exhibits pp. 19, 21, 23, 25, 27, 416).

(8) The activities of Mida, the State President, who encouraged insubordination. He knew of the litigation involving efforts to organize the police in Wyandotte and Lansing (177), and he made a speech that was given wide publicity in which he stated that "Unless the Fraternal Order of Police gets a fair deal in Detroit, they could get 100,000 men and go and push the City Hall into the river" (Exhibit Vol. I, pp. 204-206).

(9) The difficulties in traffic enforcement experienced in Indianapolis, where there was a complete breakdown of parking regulations because many of the motorists displayed Fraternal Order of Police emblems on their cars (Exhibit Vol. I, pp. 246-259).

5. Answering paragraph five, these respondents admit that the ostensible aims and purposes of the organization are as set forth in said paragraph, but these respondents deny that the organization actually operates in conformity with the purposes outlined in the National charter, but on the contrary these respondents aver that the National and State constitutions and by-laws provide for National organizers, secret work, rituals and secret passwords, provide for the sale of associate and honorary members and car emblems to outsiders, all of which is inimical to proper police work and is contrary to the best interests of the general public. That an example of the result of so-

called secret work and rituals is the refusal of Petitioner Duggan to give information to his superior about the organization because of his claim that such information was secret (Exhibit 130, Ex. Vol. II, pp. 11-46).

6. Answering paragraph six, these respondents admit that on June 5th, 1919, James Inches, then Police Commissioner of the City of Detroit, issued an order prohibiting membership by police officers in the Fraternal Order of Police, and these respondents aver that such order has never been rescinded or changed; that a copy of the said order is hereto attached and referred to as "respondents' Appendix A."

7. Answering paragraph seven, these respondents deny that the orders referred to in the said paragraph, promulgated by the Commissioners of Police, did not specifically prohibit membership in the Fraternal Order of Police, but on the contrary these respondents aver that such orders did in fact prohibit membership by police officers of the Detroit Police Department in the Fraternal Order of Police, and these respondents further aver that the order of Commissioner Inches was reaffirmed by Commissioner Witherspoon on February 23rd, 1943, and the reasons for such order stated in a report by Commissioner Witherspoon to the Common Council of the City of Detroit, copy of which report is hereto attached and marked "Respondents' Appendix B."

8. Answering paragraph eight, these respondents admit that the petitioners claim to have made inquiry relative to the holding of a banquet and admit that the Superintendent of Police made it clear to petitioner Heine that he could not organize a union or any other organization to which membership by police officers was prohibited.

9. Answering paragraph nine, these respondents admit that a dinner was held at a hotel in the City of Detroit on

Thursday, January 28th, 1943, and admit that petitioner Heine knew that permission would have to be obtained from police authorities to organize a police organization, and notwithstanding organized their organization, initiated members and elected officers, with Heine as President and Duggan as Secretary, and these respondents aver that the petitioners knew at the time of the meeting that such membership was contrary to public policy and contrary to the orders of the Police Department.

10. Answering paragraph ten, these respondents admit that a newspaper reporter was present and further aver that the reporter published an account of the meeting and among other things recited as follows:

> "In a five and one-half hour session held Thursday night behind closed doors in the Wardell Sheraton Hotel, Detroit Police Officers signified their intention of joining the National Order despite any possible executive or administrative protests" (R. 379-380).

11. Answering paragraph eleven, these respondents admit that the petitioner Heine was called into the Superintendent's office on January 30, 1943 (R. 380) and that he was interrogated by the Commissioner and Superintendent (Exhibit 139, Ex. Vol. II, p. 46-80); that these respondents aver that at the said meeting the petitioner Heine was shown the order prohibiting membership in the Fraternal Order of Police and that he advised the Commissioner of Police that he would not continue his membership in the Fraternal Order of Police but would present the matter of affiliation to the Commissioner for future determination, and these respondents aver that notwithstanding such statements to the Commissioner, Petitioner Heine did forthwith go to a meeting of the Fraternal Order of Police, which had been theretofore called,

and did engage in the organization, intitiation and election meeting of the organization (Exhibit Vol II, pp. 46-80).

12. Answering paragraph twelve, these respondents admit that the petitioner Duggan was interrogated on February 1st, 1943, (Exhibit 130, Ex. Vol. II, pp. 11-46) and that the said petitioner Duggan refused to comply with the order prohibiting membership in the Fraternal Order of Police and stated that he was willing to be a guinea pig in a test case (Vol. II, pp. 23-24).

13. Answering paragraph thirteen, these respondents admit that charges were preferred against both Heine and Duggan, and deny that they were dismissed from the Department without good cause shown, but on the contrary these respondents aver that they were found guilty of insubordination after an exhaustive hearing before the Police Trial Board, at which time they refused to avail themselves of the opportunity to take the stand and testify in their own behalf (Exhibits 128, 129 and 130; R. p. 377). In addition petitioner Duggan was found guilty of leaving his post without excuse or permission in order to join the organization.

14. Answering paragraph fourteen, these respondents admit that suit was instituted in the Circuit Court for the County of Wayne, In Chancery, and admit that the amended and supplemental bill contains the allegations set forth in the said paragraph, but these respondents deny that the allegations are true or that any such allegations were sustained by the proofs at the trial of this cause, and these respondents in their answers deny that the acts of the defendants are contrary to the rights of the plaintiffs to peaceably assemble as guaranteed by the 1st and 14th Amendments to the Constitution of the United States, and by Article 2, Section 2, of the Constitution of the State of Michigan, and deny that the

plaintiffs are denied their privileges and immunities as citizens of the United States under the 14th Amendment to the Constitution of the United States, and deny that the plaintiffs are denied equal protection of the laws guaranteed by the 14th Amendment to the Constitution of the United States and the right of free speech guaranteed by the 1st and 14th Amendments to the Constitution of the United States and by Article II, Sec. 4 of the Constitution of the State of Michigan, and these respondents further aver that no constitutional rights of the petitioners were involved or invaded, in that the prohibiory order was a valid exercise of authority in setting forth one of the conditions of employment as police officers. That the petitioners were and are free to join the Fraternal Order of Police, but that they could not retain their membership and remain police officers of the City of Detroit.

15. Answering paragraph fifteen, these respondents deny that the order should be declared void and that the order discharging Heine and Duggan should be declare void and that the petitioners are entitled to injunctive relief.

16. Answering paragraph sixteen, these respondents admit that a trial was had in Wayne Circuit Court and on June 11th, 1945, a decree was entered dismissing the bill, and these respondents attached hereto a copy of the opinion of Judge Harry B. Keidan denying the application for a temporary injunction, which opinion is marked "Respondents' Appendix C," and the opinion of Judge Frank Ferguson, sitting as Trial Judge, which opinion is marked "Respondents' Appendix D."

17. Answering paragraph seventeen, these respondents admit that an appeal was taken to the Supreme Court of the State of Michigan.

18. Answering paragraph eighteen, these respondents admit that the Supreme Court of the State of Michigan rendered an opinion on May 16th, 1947. These respondents further aver that the Supreme Court under the Michigan practice tried the case *de novo* and made a finding that the prohibitory order was a valid and reasonable exercise of the power of the Police Commissioner under the Charter of the City of Detroit and that no constitutional rights were involved or invaded. For the convenience of this Court we attach a copy of the opinion, which may be found in 318 Mich. 182, and which we mark "Respondents' Appendix E."

19. Answering paragraph nineteen, these respondents admit that a motion for rehearing was filed on the following grounds:

(1) The decision of this court denies to appellants the right to peaceably assemble, which is a right guaranteed to them as a privilege and immunity of citizens of the United States under the 14th Amendment to the Constitution of the United States.

(2) The decision of this court deprives appellants of property without due process of law, contrary to the 14th Amendment to the Constitution of the United States.

(3) The decision of this court denies to appellants the equal protection of the laws, contrary to the 14th Amendment to the Constitution of the United States.

20. Answering paragraph twenty, these respondents admit that a motion for rehearing was denied by the Supreme Court on June 27th, 1947.

II.

STATEMENT OF LACK OF JURISDICTION

21. Answering paragraph twenty-one of the petition, these respondents deny that the Supreme Court of the United States has jurisdiction to issue writ of certiorari, for the reason that no Federal question is involved and no rights under the Federal Constitution and the Amendments thereto are involved or invaded.

III.

QUESTIONS PRESENTED

22. Answering paragraph twenty-two, these respondents aver as follows:

That the order prohibiting membership by police officers in the Fraternal Order of Police, does not

(a) Violate petitioners' right of assembly as guaranteed by Article II, Sec. 2 of the Constitution of the State of Michigan and the 14th Amendment to the Constitution of the United States;

(b) Deprive petitioners of property without due process of law, contrary to the 14th Amendment to the Constitution of the United States;

(c) Deny to petitioners the equal protection of the laws as guaranteed by the 14th amendment to the Constitution of the United States.

IV.

REASONS RELIED ON FOR DENIAL OF THE WRIT OF CERTIORARI

23. Answering paragraph twenty-three, these respondents deny that petitioners may rely upon the reasons therein stated for the issuance of the writ of certiorari, in

that this Court has heretofore determined in the following cases that no Constitutional rights are invaded when a rule prohibiting membership in an organization regarded as contrary to public interest or like restrictions are promulgated by the governing police head or body,

United Public Workers of America v. Mitchell, 91 L. Ed. 509;

Fraternal Order of Police, et al. v. D. D. Harris, et al., Petition for Certiorari denied by the U. S. Supreme Court, 321 U. S. 784; 74 S. Ct. 781; 88 L. Ed. 1076;

City of Jackson v. McLeod, Certiorari denied by United States Supreme Court, 328 U. S. 863; 90 L. Ed. 1633.

Wherefore, these respondents pray that the application for writ of certiorari to review the decision of the Supreme Court of the State of Michigan be denied.

CITY OF DETROIT,
A Municipal corporation,
EDWARD J. JEFFRIES,
Mayor, City of Detroit,
JOHN H. WITHERSPOON,
Commissioner of Police,
LOUIS L. BERG,
Superintendent of Police of the City of Detroit, County of Wayne, Michigan,

By NATHANIEL H. GOLDSTICK,
Assistant Corporation Counsel,
Attorney for Defendants, Appellees and Respondents,
311 Police Headquarters Bldg.,
Detroit 26, Michigan.

RESPONDENTS' APPENDIX A

DETROIT POLICE DEPARTMENT

(Ex. 142, Record pp. 58-61, 4/3/45)

General Order #21-B
June 5, 1919

TO BE READ TO THE FORCE AND POSTED

TO ALL MEMBERS OF THE DEPARTMENT:

Subject: The Fraternal Order of Police, so-called.

My attention has been called to the fact that there is being formed within this Department an organization under the name of "Fraternal Order of Police," and that Patrolmen are being solicited to join without having any clear understanding of what its aims and objects are.

An investigation conducted this week renders it necessary to notify all Patrolman that this organization is not being formed in the interests of the Detroit Police Department and that the men who are joining it are being deceived as to its real character. The promoter of this organization in this city a short time ago, after having been arrested and fined in Monroe for whiskey running, and his actions after arriving here would not indicate that he had the good interests of any Policeman at heart, in fact, all of his remarks would indicate that his object is to create trouble for the Police Department and its members and to make money for himself. This man publishes a paper and, in so far as can be learned, his principal object in trying to form the organization is to get its mem-

bers to solicit advertisements for this publication, in fact, he stated at the first meeting that they could raise lots of money from the commissions which he would allow them for soliciting advertisements for his paper. Any such action or solicitation is expressly forbidden by the rules and regulations of the Department.

This Fraternal Order of Police has no existence in any other large city except Pittsburgh, where the two men who promoted it and published the newspaper have no active connection with the Police Department. The character of the organization is apparent from remarks which have been made in its first two meetings. The member selected as president, stated at a meeting held last Saturday evening that he did not care much for his job and that there were others who felt the same way, and that they might as well get as much as they could out of it while they were in it. This and other remarks of the same nature clearly indicate that the moving spirits in the formation of this organization are not working for the good of the Police Department or its members and that its continued existence could only detract from the welfare and efficiency of the Department.

In view of these facts, all Patrolmen are hereby forbidden to join this organization or to remain members of it, unless they want to be regarded as disloyal to the true interests of the Department.

In connection with this order, it may be appropriate at this time to call the attention of Patrolmen to the fact that the City of Detroit after July 1st will be paying is Patrolmen higher wages than are paid by any other large city in the world. At present the City of New York and the City of Detroit pay the highest wage, each paying $1650.00 per year, but in New York a Patrolman does not reach the first class until he has been five years in service,

while in Detroit he reaches it at the end of one year. Therefore, Detroit at present pays its Patrolmen better than any other large city, and this will be still further increased to $1700.00 after the first of July.

I would also like to call attention to the other benefits which a Policeman in Detroit receives in addition to his salary, and which make his job better than that of workmen who are receiving a dollar an hour. A Detroit Policeman has one day of leave in seven and ten days furlough in Winter and ten days furlough in Summer, with pay. He therefore works less than three hundred days per year and gets in cash almost $6.00 per day. But this is not all by any means. When a mechanic is taken sick, he not only loses his pay for every day that he is absent from work, but he is also compelled to pay for his medical attention, except in a few cases where provision is made by which a small portion is paid by the employers or from a mutual benefit insurance fund, which is taken out of the employe just the same. And any benefit of this kind that may come to a workman, even in these few cases, terminates after a given time, whereas in the Police Department if a Patrolman is taken sick he not only is cared for but his wages go on as long as he is unable to perform his work on account of sickness. Another important item to be considered is the fact that a Policeman has the privilege of retiring on a substantial pension at the end of twenty-five years of service. During the present year two men have retired from the Police Department on a pension of $65.00 per month, at the rank of Inspector, and while they were still under fifty years of age, and retired to accept other responsible positions. There are many thousands of workmen in the City of Detroit who have given hard service for much more than twenty-five years who cannot look forward to any assistance from any source when their working days are over.

It must therefore be plain to any Patrolman who looks into the matter that the benefits that he is receiving from the City of Detroit are equal to those of the highest class of mechanics, notwithstanding the fact that mechanics who receive the highest pay are men who have given years of service to reach the highest class in their work, while a Patrolman reaches his highest pay in one year. I desire to invite the attention of all Patrolmen to these facts and to remind them that no man who has the interests of the Police Department at heart will join any organization that shows its character right at the start as not having the best interests of he Police Deparment at heart.

Signed J. W. Inches
Commissioner

JWI:jgh

RESPONDENTS' APPENDIX B

(Record pp. 69-76)

February 23, 1943

The Honorable, The Common Council
City of Detroit
Detroit, Michigan

Gentlemen

A number of petitions have been filed with your Honorable Body concerning the order of this department prohibiting its members joining the Fraternal Order of Police. Some of the petitions have been referred to me. There have been so many incorrect statements of fact and some misunderstanding concerning the situation that I would

like to take this opportunity to describe the order, and the reason and necessity for its promulgation. The whole affair is so antagonistic to the basic police duty, the preservation of law and order, that I am going to review the circumstances somewhat in detail. It is exceedingly unfortunate that so much time and effort must be directed to this matter at a time when our every energy should be devoted to the war effort.

It should be understood at the outset that I am not opposed to an organization of policemen. There is no order in effect prohibiting the officers from in any manner organizing. The order in question is a specific order prohibiting the formation of an organization within the department known as the Fraternal Order of Police. Several Organizations are at the present time, and have, for some time, been in existence. We have, in addition to the Lieutenants and Sergeants Association, the Detroit Police Benefit Association, Inc., Detroit Police Relief Society and the Detroit Police Benefit and Protective Association. Since June 1st, 1942 when I accepted this position with the department and until very recently no proposal had been made to me for an organization of police officers, including the Fraternal Order of Police. Within the last few days an organization entirely within the department has been suggested by some of the officers. This suggestion has met with my approval.

In 1919, the then Commissioner of Police, Dr. James W. Inches issued an order prohibiting officers in the Detroit Police Department joining the organization known as the Fraternal Order of Police. Commissioner Inches, order stated as the reason for his decision that an investigation of the organization in 1919 disclosed that the promoter had been arrested and fined in the City of Monroe for whiskey running; that his actions after arrival

in Detroit did not indicate that he had the best interests of any policeman at heart. It was further stated by Commissioner Inches that the investigation disclosed that the principal object of the organizer at that time was a money raising scheme by the solicitation of advertisements for a publication put out by the so-called Fraternal Order. This order of Commissioner Inches has never been rescinded.

On January 28 a meeting of police officers was held at the Wardell Hotel. This meeting was represented to the Superintendent as a social gathering and had his approval. At this meeting plans were made for the formation of a so-called lodge in the Detroit Police Department, known as the Fraternal Order of Police. Immediately following this meeting, statements were taken by myself and the Superintendent from Howard Heine, then a patrolman in the department, Detective Bernard Duggan and others. Commissioner Inches' order was read to and by Mr. Heine who stated to the superintendent and myself that a Fraternal Order of Police organization had not been formed in the department, that they intended to ask permission before such an organization was formed. He also stated that no further meetings were arranged and that he, Heine, would not join such an organization if it was prohibited by departmental order. Notwithstanding such statement by Heine to his superior officers and directly contrary thereto, he shortly thereafter attended a meeting of the organization which had been previously arranged by himself and others. He further assisted in the organization of an F. O. P. order in the department and accepted the office of President.

Detective Duggan, in his statement to the Superintendent and myself admitted knowledge of the order prohibiting membership in the F. O. P., but stated that he dis-

agreed with the order and admitted that he left his regular tour of duty without permission to join the organization. Charges were preferred before the Police Trial Board against these two officers for the offenses briefly outlined above and after a full hearing they were found guilty and discharged from the department.

In the meantime full and complete consideration was given by me to the question of whether Commissioner Inches' order of 1919 should be amended, rescinded or continued in full force and effect. The result of this consideration is stated in my order, dated February 3, 1943 providing in part as follows:

> "I am not rescinding Commissioner Inches' order at this time, as I do not believe it to be in the best interests of this department and its future for the members to become affiliated with this so-called Fraternal Order. This conclusion has been reached after an investigation of the Order and a thorough and sincere consideration of all the factors involved.
>
> "The organization is not in any manner a 'Fraternal Order' in the generally accepted use of the term. It has no disability or insurance benefit fund. The Constitution provides for an office of 'National Organizer.' A portion of the dues paid are returned to the State Lodge and a part to the National Headquarters. The Grand President is empowered to compel any local lodge to comply with all edicts, laws and regulations of the Grand Lodge and its Executive Committee. One of the principal objects of the organization, as described by its State President, is to secure higher wages for Police Officers. Although the preamble of its Constitution expressly provides that it 'cannot affiliate with any Labor Organization,' the Order has more similarity to a Labor Union than a Fraternal Order.
>
> "One of its principal activities in some communities has been the raising of funds. Contributions

have been solicited of Detroit businessmen, especially those doing an interstate business, for benefit balls, picnics and the like, held by Lodges located in Ohio and Indiana. Business men in Detroit have been solicited for advertisements in the publication issued by the Order. The membership is not restricted to Police Officers, as citizens can become Associate Members. This provision, together with the practice of solicitation of funds, would make possible the extension of special courtesies which could readily conflict with the sworn duties of a Police Officer.

"The most serious condemnation that can be made of this organization is the manner in which the attempt has been made to organize it in this Police Department. The action of at least two of the organizers who have been elected to hold office in the organization in promoting it in the department has been flagrantly insubordinate and constitutes a direct and deliberate disobedience of the order of this department. This action upon the part of the two officers has resulted in charges being preferred for hearing before the Trial Board. Both of these men knew, at the time they applied and accepted membership in this organization that such was expressly prohibited by departmental order. One of the men left his regular tour of duty without permission of his superior officer to become a member.

"This conduct on the part of the two principal organizers of the Lodge in this department is, in effect, a strike against the department, a deliberate attempt to destroy the law and order that all police officers are sworn to uphold. It is unthinkable that a police department in a large metropolitan community, of necessity quasi-military in nature, could tolerate and continue to exist with such flaunting of discipline. Control of the department must and will remain in the elected and appointed officials entrusted with that responsibility.

> "It is obvious that this organization on the basis of its Constitution, history and record would be detrimental to the best interests of the Detroit Police Department and its members."

I had in my possession for the purpose of this consideration the National Constitution of the Order, the State Constitution and By-laws together with the files and records of the department pertaining to the so-called lodge and also the experience with it in some other communities. It was my considered opinion that the organization would be detrimental to the Detroit Police Department and its officers, if for no other reason than the manner in which the attempt had been made to organize it in the department. The whole campaign has been in open defiance of the very law and order that a police officer is sworn to maintain. When the State President of the organization, an officer from the Dearborn Police Department, encourages Detroit Police officers to ignore a departmental order and to join the organization, conducts an initiation into the order of an officer who deserted his post of duty to join—it is readily apparent that the maintenance of discipline in the department insofar as the F. O. P. is concerned would be impossible. The statement ascribed to the State President of the organization, in his Port Huron speech, is illustrative of the attitude of its leader. He is quoted as saying

> "If the F. O. P. is unsuccessful in establishing itself in Detroit and if certain ills in the Police Department are not corrected, we can easily get 100,000 men and they'll push the Detroit city hall into the river."

It is the sworn duty of the Detroit police officer to prevent and protect the public from the kind of conduct advocated by the State President of the F. O. P.

If the F. O. P. would not create a divided control in the department; if its leaders were sincere in their statement that there is nothing in the concepts of the organization that would be detrimental to our police force, they could in a lawful and orderly manner test the question of the validity of the order banning the organization in the department. This has been the well established procedure in a number of cities where similar controversies have arisen. Despite the fact that the validity of the departmental order prohibiting the F. O. P., as well as the action of the Police Trial Board is now pending in court, the F. O. P., its organizers and agitators at the present time are exercising every effort to encourage officers in the department to violate their oath and to ignore the departmental order. They have deliberately fostered a situation where the only issue is whether the duly appointed officials or the F. O. P. is in control of the department.

Membership in organizations by police officers is considered of such importance in the Detroit Department that the very foundation of an officer becoming a member of the force is conditioned upon it. Their oath of office, in addition to the requirement that they must swear to uphold the Constitution of the United States and the State of Michigan provides in part as follows:

> "* * * *and that I will not be or become a member of any Organization prohibited by the rules of the Detroit Police Department.* * * *"

I have said in my order that this organization has more similarity to a labor union that any other type of organization and for this reason, among others, cannot exist in the Detroit Department. It is my opinion that a police officer cannot consistently belong to a Union and perform his sworn duty. I am not an opponent of labor

unions but firmly believe that they have no place in a Metropolitan Police Department. Policemen are public officers. They have taken an oath of office that requires them to enforce the law with strict impartiality regardless of what their personal feelings may be. They should not and cannot be subject to the orders or dictation of any organization. The work of a police officer is sharply differentiated from that of a worker in private employment. He is to enforce the law upon all classes of citizens without fear or favor. If a conflict exists between his sworn duties as a policeman and his obligation to the F. O. P., the situation immediately arises that always occurs when a man attempts to serve two masters—he either fails in his duty as a police officer or in his obligation to the organization. It is readily apparent from the activities of the F. O. P. to date that his first obligation in their concept, is to that organization.

A police department is a quasi-military organization—the preservation of discipline is an essential factor of primary importance. The present activity of this fraternal order, so-called, is an obvious effort to destroy that basic requirement. The demoralizing impact upon the department apparently intended by this so-called lodge will not be effective—control will be retained by those vested with that responsibility. I am convinced that the rank and file are not in sympathy with the movement to undermine the department. The large majority of police officers are complying in full with their oath of office and are upholding their sworn duty as police officers. They will continue to do so.

The officers violating their oath, and joining the organization banned by official order will have charges preferred against them and will be brought before the Police Trial Board. Every effort and all means necessary will

be used to enforce the order which is in my opinion, manifestly necessary.

I will be glad to furnish at any time any additional information that your Honorable Body may desire concerning this matter.

Respectfully submitted,

John H. Witherspoon,
Commissioner.

JHW-s
d.

RESPONDENTS' APPENDIX C

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne.

Before the Honorable Harry B. Keidan, Circuit Judge

STATE LODGE OF MICHIGAN, FRATERNAL ORDER OF POLICE, et al., Plaintiff, v. CITY OF DETROIT, a Municipal Corporation, et al., Respondent.	No. 338,440.

THE OPINION OF THE COURT

The Court: Well, gentlemen, I regret very much that this situation has arisen. It would have been better for everybody concerned if those who are promoting the Fraternal Order of Police in Detroit had gone to the proper officials and communicated their desires to them, and if they received from such officials a negative reaction, to then present the matter to the Court for judicial determination before proceeding with the organization and thus jeopardize the position of many men in the Police Depart-

ment. That wasn't done however, and that's water over the dam.

This case, as I see it, presents purely a legal question, namely, where the Police Commissioner of the City of Detroit, both the person now holding that position and his predecessors, had a legal right to pass a rule or regulation prohibiting membership in a particular organization.

I am not the Police Commissioner of the City of Detroit and, under the law, I have no right to substitute my judgment for his. Courts have held time and again that even legislation that attempts to delegate to a court the power of administration is unconstitutional.

However, courts do have the legal right to review the action of administrative bodies, in order to determine whether they acted within the authority of law, and that's as far as this Court can go.

Now, no one claims, and no one can claim that a Police Commissioner can prohibit a policeman from joining any or all organizations. That, of course, would be contrary to the constitution of this country and the constitution of this state, but the courts have generally held that they do have a right to prohibit their attachment to an organization, the objects of which might interfere with the proper performance of the duties of police officers.

Now, there is no question but what under the Charter, the Police Commissioner of this City has the legal right to pass such rules and regulations as, in his judgment, he deems to be in the best interests and for the welfare of the people of the municipality.

The question arises, therefore: Is the enactment of the particular rule that has been questioned in this case reasonable, or was the action of the Commissioner and his

predecessor arbitrary and capricious? and I think that defines the power of this Court.

I have given careful attention to the testimony that has been taken here, both on the Petition for an Order to show Cause why an Injunction should not be issued, and also on the motion to dismiss, and I cannot help but reach the conclusion that the action of the Commissioner was not arbitrary and capricious. He has stated on the record of this Court the reasons for re-enacting or continuing the rule established by Commissioner Inches years ago. There have been produced on the hearing of these motions certain documentary evidences as to the activity of other lodges of this organization in other communities, which the Commissioner testifies, in his judgment, he cannot approve of, if carried out through the local lodge of the Fraternal Order of Police, and it is significant, too, that both the President of the State Fraternal Order of Police and the President of the Local, when confronted with certain alleged actions on the part of other locals, themselves have disapproved of such conduct.

I cannot say as a matter of law that the action of the Commissioner, in enforcing this rule, is either arbitrary of capricious, and, as I said before, I can not substitute my judgment for that of the Police Commissioner. If the Police Commissioner's actions do not meet with the approval of the men, that is a matter which can be corrected by appealing to the appointive power of the City of Detroit, but for any Court to undertake to say that the Commissioner should not have passed, or re-enacted, a rule similar to the one in question would be going beyond any power that the Court has ever tried to exercise, so far as I know. So that it becomes the duty of the Court to deny the petition for injunctive relief.

That leaves the question as to the Motion to Dismiss, filed on behalf of the defendants. I believe, as I indicated before, that a judicial determination of this issue should be had without delay, and as soon as possible. If counsel will agree that I may interpret the rule in question as being set up in the Bill of Complaint, why I am prepared to dispose of that motion now. I don't know as there is any copy of the rule set up in the Bill of Complaint. On a Motion to Dismiss the Bill of Complaint, everything must be before the Court, and as to the allegations that are well pleaded in the bill, it must be assumed to be true. Now, if you gentlemen will agree that the rule referred to in the evidence is in the Bill of Complaint, I will dispose of that now so that you can get a review of this matter as soon as possible.

Mr. Goldstick: Well, if the Court please, in view of the Court's declaration to the effect that the Court desires to dispose of this matter on the merits, so to speak—that is to say, that we are all entitled to a determination of the legality of the rule, or the right of the Court to interfere with the Police Commissioner, and in view of the fact that testimony has been taken, probably all of the testimony that would be taken in a trial of the cause on the merits, I would be willing to stipulate with counsel that the Court's opinion shall be embodied in a final decree so that if counsel cares for a further adjudication in the Supreme Court, we can speedily go there and that will eliminate all of the intermediate motions and counter motions. Now, it seems to me that we ought to be able to agree that the Court's decision will be embodied in a final decision that can be appealable, without leave of the Court, to the Supreme Court.

The Court: Well, I believe, gentlemen, that you should get a final decision from the higher court as soon as pos-

sible. I think it is to the interest of the police and to the interest of the public. From the information that I have received during the hearing of this matter, matters within the department are in a sad state, and each day just makes it that much worse. I think the sooner this matter is decided finally, the better for everyone, and I hope that there won't be any delays on the part of either side.

Mr. Goldstick: Well, I am prepared to proceed.

The Court: Now, after all, we have got to remember that the Police Department, as has been said in each of the cases that I have looked at, is a quasi-military organization. This country is at war, and only the Lord knows what may happen. I think to have a Police Department split as this department is being split now, according to the information I have, is very detrimental to the public interests, and I think the sooner we have this matter finally decided, the better off everyone concerned will be, especially the people of this city. So if you want to do that, it will be a good thing.

RESPONDENTS' APPENDIX D

STATE OF MICHIGAN—In the Circuit Court for the County of Wayne, In Chancery

STATE LODGE OF MICHIGAN, FRATERNAL ORDER OF POLICE, a Michigan non-profit corporation, VICTORY LODGE No. 115, FRATERNAL ORDER OF POLICE, an unincorporated voluntary association; HOWARD HEINE, BERNARD L. DUGGAN and HENRY MIDA, Plaintiffs, v. THE CITY OF DETROIT, a Municipal Corporation; EDWARD J. JEFFRIES, Mayor of the City of Detroit, et al., Defendants.	No. 338,440.

OPINION OF THE COURT

Howard H. Heine and Bernard L. Duggan were police officers holding the rank of detectives in the Police Department of the City of Detroit. January 28, 1943, they attended a dinner party at which Henry Mida, president of the State Lodge of Michigan, Fraternal Order of Police, discussed the organization of a local chapter of the Fraternal Order of Police, in the Police Department of the City of Detroit. At this meeting it was decided to organize a local lodge and a meeting was called for January 30, 1943, for that purpose. Detectives Heine and Duggan were active in arranging this meeting and in organizing the Victory City Lodge 115, Fraternal Order of Police. Heine was elected president and Duggan was elected secretary. They were also appointed on a committee to draw up the constitution and by-laws of said lodge.

January 30, 1943, prior to the meeting at which said lodge was organized, Heine and Duggan were called before John H. Witherspoon, Commissioner of Police, and Louis L. Berg, Superintendent of Police, and questioned about their activities in this organization. They were informed of an order issued June 5, 1919, by Police Commissioner, Dr. James W. Inches, prohibiting members of the Police Department joining the Fraternal Order of Police, which order reads as follows:

"DETROIT POLICE DEPARTMENT

General Order #21-B
June 5, 1919

TO BE READ TO THE FORCE
AND POSTED

To All Members of the Department:

Subject: The Fraternal Order of Police, so-called.

My attention has been called to the fact that there is being formed within this Department an organization under the name of 'Fraternal Order of Police,' and that Patrolmen are being solicited to join without having any clear understanding of what its aims and objects are.

An investigation conducted this week renders it necessary to notify all Patrolmen that this organization is not being formed in the interests of the Detroit Police Department and that the men who are joining it are being deceived as to its real character. The promoter of this organization arrived in this city a short time ago, after having been arrested and fined in Monroe for whiskey running, and his actions after arriving here would not indicate that

he had the good interests of any Policeman at heart, in fact, all of his remarks would indicate that his object is to create trouble for the Police Department and its members and to make money for himself. This man publishes a paper and, in so far as can be learned, his principal object in trying to form the organization is to get its members to solicit advertisements for this publication, in fact, he stated at the first meeting that they could raise lots of money from the commissions which he would allow them for soliciting advertisements for his paper. Any such action or solicitation is expressly forbidden by the rules and regulations of the Department.

This Fraternal Order of Police has no existence in any other large city except Pittsburgh, where the two men who promoted it and published the newspaper have no active connection with the Police Department. The character of the organization is apparent from remarks which have been made in its first two meetings. The member selected as president, stated at a meeting held last Saturday evening that he did not care much for his job and that there were others who felt the same way, and they might as well get as much as they could out of it while they were in it. This and other remarks of the same nature clearly indicate that the moving spirits in the formation of this organization are not working for the good of the Police Department or its members and that its continued existence could only detract from the welfare and efficiency of the Department.

In view of these facts, all Patrolmen are hereby forbidden to join this organization or to remain members of it, unless they want to be regarded as disloyal to the true interests of the Department.

* * *"

They were also charged with notice of an order issued May 26, 1936, by Commissioner Heinrich A. Pickert, which reads as follows:

"DETROIT POLICE DEPARTMENT

Office of the Commissioner

General Order #347

May 26, 1936

To All Members of the Department:

Subject: Organizations in Conflict with Police Duty.

Your attention is called to Section 124 of the General Rules in the Detroit Police Manual, which reads as follows:

'Prior Claim on Police Duty. A member of the Department is prohibited from affiliating with any organization or body, the provisions of the constitution of which would in any way exact prior consideration and prevent him from performing police duty.'

The oath you took at the time of your appointment reads as follows:

'I, (repeat own name), do solemnly swear that I will support the constitution of the United States, the constitution of the State of Michigan, obey the rules and regulations of the Detroit Police Department, and faithfully perform the duties of a policeman, and that I will not be or become a member of any organization whatever which is affiliated with any organization which holds or claims or exercise the right to demand obedience of me or to direct me to disobey a rule of the Detroit Police Department, so help me God.'

Any member belonging to organizations in conflict with the above shall immediately sever all connections."

At this meeting with Commissioner Witherspoon and Superintendent Berg, Heine and Duggan were told that they could not join the Fraternal Order of Police. Disregarding these orders, they went to the meeting the same evening and continued activities in the organization of the lodge. The next day a conference was had with detective Duggan at which he insisted upon his right to join said lodge, and refused to sever his connection with the same, whereupon, on the following day, February 2, 1943, charges were preferred against Heine and Duggan as follows:

"DETROIT POLICE DEPARTMENT

Office of the Superintendent

Date: February 2, 1943

Division or Precinct
No. Recorder's
Court

To: Patrolman Howard Heine

You are hereby notified to appear before the Police Trial Board at 9:00 A. M. on Friday, February 5, 1943 to answer charges which have been preferred against you.

Peter J. Bauer, Lieutenant
Commanding Recorder's Court
Division.

"1. *Disobedience of Rules and Order of the Police Department:*

(a) That he did assist in the organization of and did join the Fraternal Order of Police in violation of General Order #21-B dated June 5, 1919, prohibiting police officers from joining the Fraternal Order of Police or remaining members of the same.

(b) That he did assist in the organization of and did join the Fraternal Order of Police in violation of Section 124 of the Detroit Police Manual reading as follows: 'A member of the Department is prohibited from affiliating with any organization or body, the provisions of the constitution of which would in any way exact prior consideration and prevent him from performing police duty.'

(c) That he did assist in the organization of and did join the Fraternal Order of Police notwithstanding the fact that he had theretofore been advised and knew that no permission had been given for membership in the Fraternal Order of Police.

2. *Report Falsely to a Superior Officer:*

That on Saturday, January 30th, 1943, he did report to the Commissioner and Superintendent of Police that no arrangements had been made for a further meeting of the group organized as the Fraternal Order of Police, when in truth and in fact the said Heine did assist in arrangements for the holding of a meeting of the group known or to be known as the Fraternal Order of Police, for the afternoon of Saturday, January 30th, 1943, and that when Heine advised the Commissioner and Superintendent of Police that no further meeting had been planned, he well knew that such a meeting had been planned for the afternoon of Saturday, January 30th, 1943.

3. *Insubordination to a Superior Officer:*

That on Saturday, January 30th, 1943, said Heine did advise the Commissioner and Superintendent of Polire that he, Heine, would not violate an order of the Department of Police in order to join the Fraternal Order of Police and that

if the Order prohibiting such organization affiliation was not rescinded he, Heine, would withdraw from such organization; that notwithstanding such statements to the Commissioner and Superintendent of Police, he, the said Heine, did immediately thereafter go to the meeting of the Fraternal Order of Police, that he did conduct such meeting as President of the organization, did join and remain a member of such organization, and did assist in the induction of other members of the Detroit Police Department in the organization."

"DETROIT POLICE DEPARTMENT
Office of the Superintendent,

Date: February 2, 1943

No. Juv. Div. Division or
To Detective Bernard L. Duggan Precinct

You are hereby notified to appear before the Police Trial Board at 9:00 A. M. on Friday, February 5, 1943 to answer to charges which have been preferred against you.

William M. Johnson,
Detective Inspector
Commanding Juvenile Division

1. *Absent from Duty Without Leave or Permission:*

   (a) That he did absent himself from duty without leave or permission and without reporting his whereabouts on Saturday, January 30th, 1943 from 3 to 4 P. M.

2. *Disobedience of Rules and Orders of the Police Department:*

   (a) That he assisted in the organization of and joined the Fraternal Order of Police, in vio-

lation of General Order #21-B dated June 5, 1919, prohibiting police officers from joining the Fraternal Order of Police or to remain members of the same.

(b) That he assisted in the organization of and joined an organization known as the Fraternal Order of Police in violation of Section 124 of the Detroit Police Manual, reading as follows: 'A member of the Department is prohibited from affiliating with any organization or body, the provisions of the constitution of which would in any way exact prior consideration and prevent him from performing police duty.'

(c) That he did on Saturday, January 30th, 1943, assist in the organization of and did join an organization known as the Fraternal Order of Police, well knowing that such action was contrary to the express orders and rules of the Detroit Police Department.

3. *Insubordination:*

That on Monday, February 1st, 1943, that he declared to the Commissioner and Superintendent of Police that he did join the Fraternal Order of Police, notwithstanding the departmental rule, because he, Duggan, believes the rule to be wrong.''

February 3, 1943, Commissioner Witherspoon made the following order:

"DETROIT POLICE DEPARTMENT

Office of the Commissioner

General Order #561

February 3, 1943.

To All Members of the Department:

Subject: Membership in the Fraternal Order of Police, so-called.

Two meetings have recently been held by members of the department. At the meeting held Thursday, January 28, 1943, temporary officers were elected; subsequently and on January 30, 1943, several members of this department made application for membership, paid dues and became members of an organization known as the Fraternal Order of Police.

In General Order No. 21-B, dated June 5, 1919, and signed by the then Commissioner of Police, James W. Inches, membership in the Fraternal Order of Police by patrolmen in this department was prohibited. This provided in part, as follows:

> 'In view of these facts all Patrolmen are hereby forbidden to join this organization or to remain members of it, unless they want to be regarded as disloyal to the true interests of the department.'

This order has never been rescinded and is in full force and effect at this time. The order of 1919 uses the word 'patrolmen,' apparently to distinguish police officers from civilian members of the department. It seems clear, from a reading of the entire order, that it applies to all officers. However, in order that there shall be no misunderstanding, the

order of this department pertaining to this organization covers police officers of every rank and duty. This order of Commissioner Inches, as is expressly stated therein, was based upon an investigation of the organization at that time which disclosed that the promoter had been arrested and fined in the City of Monroe for whiskey running; that his actions after arriving in Detroit did not indicate that he had the best interest of any policeman at heart. It was further stated by Commissioner Inches that the investigation disclosed that the principal object of the organizer at that time was a money raising scheme by soliciting advertisements for a publication put out by the so-called Fraternal Order.

I am not rescinding Commissioner Inches' order at this time, as I do not believe it to be in the best interests of this department and its future for the members to become affiliated with this so-called Fraternal Order. This conclusion has been reached after an investigation of the Order and a thorough and sincere consideration of all the factors involved.

The organization is not in any manner a 'Fraternal Order' in the generally accepted use of the term. It has no disability or insurance benefit fund. The constitution provides for an office of 'National Organizer.' A portion of the dues paid are returned to the State Lodge and a part to the National Headquarters. The Grand President is empowered to compel any local lodge to comply with all edicts, laws and regulations of the Grand Lodge and its Executive Committee. One of the principal objects of the organization, as described by its State President, is to secure higher wages for Police Officers. Although the preamble of its Constitution expressly provides that it 'cannot affiliate with any Labor Organization,' the Order has more similarity to a Labor Union than a Fraternal Order.

One of its principal activities in some communities has been the raising of funds. Contributions

have been solicited of Detroit businessmen, especially those doing an interstate business, for benefit balls, picnics and the like, held by lodges located in Ohio and Indiana. Businessmen in Detroit have been solicited for advertisements in the publication issued by the Order. The membership is not restricted to Police Officers, as citizens can become Associate members. This provision, together with the practice of solicitation of funds, would make possible the extension of special courtesies which could readily conflict with the sworn duties of a police officer.

The most serious condemnation that can be made of this organization is the manner in which the attempt has been made to organize it in this Police Department. The action of at least two of the organizers who have been elected to hold office in the organization in promoting it in the department has been flagrantly insubordination and constitutes a direct and deliberate disobedience of the order of this department. This action upon the part of the two officers has resulted in charges being preferred for hearing before the Trial Board. Both of these men knew, at the time they applied and accepted membership in this organization that such was expressly prohibited by departmental order. One of the men left his regular tour of duty without permission of his superior officer to become a member.

This conduct on the part of the two principal organizers of the Lodge in this department is, in effect, a strike against the department a deliberate attempt to destroy the law and order that all police officers are sworn to uphold. It is unthinkable that a police department in a large metropolitan community, of necessity quasi-military in nature, could tolerate and continue to exist with such flaunting of discipline. Control of the department must and will remain in the elected and appointed officials intrusted with that responsibility.

It is obvious that this organization on the basis of its Constitution, history and record would be detrimental to the best interests of the Detroit Police Department and its members.

Several of the men who have joined this organization have stated that they were unaware of the existence of the order in 1919. Police officers of every rank and duty in this department are hereby advised that the order of 1919 is in full force and effect. Such officers are hereby forbidden to join this organization or to remain members of it. To do so will be directly contrary to the oath that all of you took when you became members of the Detroit Police Department.

John H. Witherspoon,
Commissioner."

February 3, 1943, Heine and Duggan, the State Lodge of Michigan, Fraternal Order of Police, and the local lodge, Victory City Lodge 115, filed a bill of complaint seeking an injunction to restrain the defendants from interfering with the organization of the local lodge, prohibiting police officers from joining the same, and holding trials on the charges preferred against Duggan and Heine.

A restraining order was not issued and the Trial Board proceeded with its trials. On February 5th and 6th, 1943, Heine and Duggan were found guilty and dismissed from the Police Department. An order to show cause why the injunction should not issue as prayed for in the bill of complaint, was issued on February 9, 1943, which came on for hearing before the Honorable Harry B. Keidan, and which was denied March 4, 1943.

June 25, 1943, an amended and supplementary bill of complaint was filed in pursuance of an order of the Court, wherein plaintiffs asked for an injunction reinstating Duggan and Heine as police officers and restraining the

defendants from interfering with the organization of Victory City Lodge 115, Fraternal Order of Police, and from prohibiting police officers from joining the same. The defendants filed an answer July 14, 1943. The trial began February 27, 1945, and was concluded April 4, 1945.

The plaintiffs claim:

First: The Commissioner of police was without power to issue an order prohibiting a police officer from becoming a member of the Fraternal Order of Police;

Second: That the order prohibiting membership in the Fraternal Order of Police is unconstitutional because it denies the right of free speech, the right of assembly and the equal protection of the law as guaranteed to them under Section 1 of the Fourteenth Amendment of the Constitution of the United States, the First Amendment of the Constitution of the United States, Article 2, Section 2 of the Constitution of the State of Michigan, Article 2, Section 4 of the Constitution of the State of Michigan;

Third: That the Commissioner's action was arbitrary and unreasonable because under the constitution and by-laws of Victory City Lodge 115, Fraternal Order of Police, there is nothing inimical to the performance of police duties but, on the contrary, its organization and existence and membership therein by police officers will be helpful and beneficial to police work;

Fourth: That the discharge of Heine and Duggan was unreasonable and unauthorized and they should be reinstated.

I shall deal with the plaintiffs' contentions in the order named.

First: The Police Commissioner of the City of Detroit is appointed by the Mayor of the City of Detroit. The authority for his appointment is found in Title IV, Chapter XXI, Section 1 of the Charter of the City of Detroit, which reads:

> "There shall be a Commissioner of Police who shall be appointed by the Mayor and who shall have charge of the Police Department."

The Commissioner has such powers and duties as are conferred upon him under Title IV, Chapter XXI, Section 5 (a), (c) and (m) of the Charter of the City of Detroit, which reads:

> "Sec. 5. The powers and duties of the Commissioner, which shall be exercised and performed as herein provided, and in accordance with the laws of the state and the ordinances of the city, shall be as follows:
>
> (a) He shall assume and exercise supervision over the police department and make all proper rules for the government and discipline thereof;
>
> (c) Shall preserve the public peace and prevent crime, arrest offenders and protect the rights of persons and property, guard the public health, preserve order and enforce the laws of the state and the ordinances of the city;
>
> (m) Shall have such other powers as are herein prescribed or may be necessary hereunder for the proper discharge of his duties."

By virtue of the authority granted in the above Charter provisions, the Commissioner has the authority to make all proper rules for the government and discipline of the Police Department. However, the courts have held that orders made for this purpose must be reasonable and the reasonableness of the exercise of police power is sub-

ject to judicial review. The determination as to the reasonableness must be made in the light of the facts presented in each case. I therefore decide that the Commissioner has the authority to make reasonable orders for the government and discipline of the Police Department. I will pass on the reasonableness of said order later when I consider Plaintiffs' third contention.

Second: Plaintiffs contend that the Commissioner's order prohibiting membership in the Fraternal Order of Police is unconstitutional because it is in conflict with the First Amendment to the Constitution of the United States, Section 1 of the Fourteenth Amendment to the Constitution of the United States and Section 2, Article 2 of the Constitution of the State of Michigan. Defendants claim the order does not conflict with these provisions of the Federal and State Constitutions and is, therefore, constitutional and it was held in the case of *Fraternal Order of Police v. Lansing Board of Police and Fire Commissioners,* 306 Mich, page 68.

Plaintiffs contend that the constitutional questions were not raised in that case, were not passed upon by the trial Judge nor the Supreme Court, and that for this reason plaintiffs were deprived of a review in the Supreme Court of the United States. I have examined plaintiffs' bill of complaint in the Lansing case and find that in paragraph 10 it was claimed that the order prohibited the right of people to peaceably assemble, contrary to the provisions of the First Amendment to the Constitution of the United States, and that it denied police officers equal protection of the law, contrary to Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the right of assembly, contrary to Section 2, Article 2 of the Constitution of the State of Michigan.

I have read Judge Carr's opinion in that case and find that he treated the constitutional questions raised at some length and decided that the First Amendment to the Constituion was a resriction of the power of the Federal Government and does not directly concern action by state or municipal authority. I also find that he decided that certain provisions of the Bill of Rights of the State Constitution were involved and there was no specific showing of any violation of such provisions, but did find that under the Fourteenth Amendment to the Federal Constitution, as well as under certain provisions of the Constitution of the State of Michigan, the reasonableness of the action of the Board was a matter for consideration.

I have examined the opinion by the Supreme Court and find that the constitutional question was considered and disposed of in the following manner: "Neither the plaintiffs nor the individuals concerned are deprived of any constitutional right." I therefore am of the opinion that plaintiffs' contention that constitutional questions were not properly raised and disposed of in the trial court and in the Supreme Court in the Lansing case, is without merit. I therefore find that the order does not conflict with the provisions of the Constitutions mentioned.

However, under the Constitutions of the United States and of the State of Michigan the question of reasonableness of an order of a police commissioner is a proper judicial inquiry. I will now consider the reasonableness of this order in the light of constitutional amendments.

This is an order involving discipline in the Detroit Police Department. This does not interfere with an individual's right to exercise free speech and free assembly. The Fraternal Order of Police did not attempt to organize a lodge of private citizens. What it attempted to do was organize a lodge of police officers. This order of the

Commissioner does not affect the plaintiffs' rights as private citizens in joining a lodge, but it does affect the rights of a police officer.

The Courts have said:

> "Those who serve the public either as makers of the law, or interpreters of the law, or those who enforce the law, must necessarily surrender, while acting in such capacity, some of their presumed private rights."

If the plaintiffs, Duggan and Heine, desired to retain their positions in the public service, they should have obeyed the Commissioner's order. Having elected not to do so, which, of course, was the privilege of each one of them as individuals, they cannot successfully complain of the ensuing results.

Many cases have been considered in other jurisdictions involving the question under consideration in this case. In *Brownell v. Russell,* 76 Vt. 326, an order forbade members of the police department from taking part in any political caucus. The Court said:

> "We think that the removal of the police force from the field of active politics is calculated to promote the efficiency of the force and the purity of municipal government, and that the rule adopted imposes no greater restriction than is reasonably necessary to the accomplishment of this purpose."

In *Carter v. Thompson,* 164 Va. 312, the Court in considering an order prohibiting firemen from joining a local lodge affiliated with the International Association of Fire Fighters, said:

> "Police and fire departments are in a class apart. Both are at times charged with the preservation of public order, and for manifold reasons they owe to

> the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained."

The order was found reasonable.

In *Hutchinson v. Magee,* 278 Pa. 119, the Court said:

> "It is generally conceded that association with an organization which, on any occasion or for any purpose, attempted to control the relations of members of either the police or fire departments toward the municipality they undertake to serve, is, in the very nature of things, inconsistent with the discipline which such employment imperatively requires, and therefore must prove subversive of the public service and detrimental to the general welfare. * * *"

In *Neustein v. Mitchell,* 52 Fed. Supp. 531, the Court considered the Hatch case prohibiting political activity on the part of employees. Under this act no officer or employee with any state or local agency financed by Federal loans or grants should take any active part in political management or in political campaigns under penalty of the withholding of Federal loans or grants equal to two years' compensation of the offending employee. This order was held reasonable and not a violation of plaintiff's constitutional rights.

There are cases which uphold the right of boards of education to prohibit teachers from joining labor unions.

> *Seattle High School Cap. No. 200 v. Sharpers,* 293 Pac. 994 (Wash);
> *Frederick v. Owens,* 35 Ohio Ct. Ct. Reports, 538.

The courts have upheld legislation abolishing fraternities in state universities and prohibiting the joining of fraternities by high school school students.

University of Mississippi v. Law, 233 U. S. 589; *Steele v. Sexton,* 253 Mich. 32.

"There is no doubt the control of a city police department is a function of municipal government. *Smith v. Flint City Commission,* 258 Mich. 698."

In *Doyle v. Kammeraad,* 310 Mich. 241, and *Fraternal Order of Police v. Lansing Board of Police and Fire Commission,* 306 Mich. 68, the Court said:

"The individual defendants herein were responsible to the people for law enforcement and preservation of the public peace. Members of a police force, as well as its responsible officers, in many respects constitute a military force, something more than an ordinary executive branch of government. Discipline must be enforced, and the members must surrender individual powers and freedom of action in favor of undivided allegiance to their police duty."

Plaintiffs contend that there is nothing inimical to the performance of police duties under the constitution and by-laws of Victory City Lodge 115, Fraternal Order of Police, but, on the contrary, its organization and existence and membership therein by police officers will be helpful and beneficial to police work.

The plaintiffs have called a number of witnesses from various parts of the United States, including patrolmen, detectives, sheriffs and chiefs of police, who belong to the Fraternal Order of Police in their respective communities, who have testified that membership in the Fraternal Order of Police did not in any way conflict with the duties of a police officer, but, on the contrary, brought about association of police officers from various communities which was helpful and beneficial to police work.

On the other hand, the defendants produced testimony to show that many of the lodges throughout the country made a practice of issuing associate membership cards to citizens and charged dues in sums ranging from five to ten dollars apiece; that a metal emblem with the insignia of the Fraternal Order of Police impressed thereon was issued to associate members to be displayed above the license plate of the car, and contended that there was a possibility that, even though this was not to be the practice in Victory City Lodge 115 in the City of Detroit, if associate members visited Detroit, certain courtesies and special privileges might be extended to brother members of a lodge from another community in event they violated parking ordinances or other laws.

I agree with Justice Bushnell, who in the Lansing case said:

> "One would be naive, indeed, to assume that such automobile emblem did not carry with it the intimation of special privilege to associate members. This of itself is enough to require the determination that the existence of plaintiff organization within the law-enforcement body of a municipality is contrary to public policy."

It is, therefore, reasonable to assume that if associate members of the Fraternal Order of Police in other communities visited Detroit, displaying an emblem, they would expect special privileges and they would receive the same.

It is defendants' contention that local lodges of the Fraternal Order of Police in other communities have raised money by staging dances and carnivals, and that they have solicited citizens of their community for donations and subscriptions for advertising in programs publicizing said events, and that this method of raising funds likewise carries with it an intimation of special privileges to those who contrbute.

Plaintiffs contended that the Commissioner and superior officers of the Police Department of the City of Detroit countenanced this method of raising funds for the Police Benevolent Association when they solicited contributions from citizens and subscriptions for advertisements in the Police Field Day magazine; that if they took no steps to prohibit this activity, they were not in a position to complain if the same methods were used to raise funds by the Fraternal Order of Police.

Perhaps, if contributions were sought and subscriptions for advertising were taken from citizens whom the Police Department did not contact daily in the enforcement of the law, it might not be objectionable, although there is some doubt in my mind as to that. But if the donations and the solicitation for advertisements are taken from those citizens and business places whom the Police Department call on daily to observe whether or not they are violating the law, then these donations might convey to the donors that they will receive privileges and leniency from the police officers, and this would be equally objectionable and contrary to public policy.

At this point we must note a further contention of the plaintiffs that, Victory City Lodge does not intend to do these things which are objectionable. But if this lodge is formed, the Police Department has no control over the actions of the Fraternal Order of Police in the future. The order prohibiting membership in the Fraternal Order of Police is not an order against the Fraternal Order of Police. It does not in any way interfere with the Fraternal Order of Police forming a lodge in the City of Detroit. It does not interfere with lodge business, or could it interfere with the lodge activities because the lodge is not under the supervision or control of the Police Department.

Courts are not called upon to determine whether or not the order of a police commissioner was a wise one. The Court has no right to substitute its judgment for the commissioner's. Even legislation giving the courts the power of administration has been held unconstitutional. The sole question to be determined is: is the rule reasonable or is it arbitrary and capricious? I cannot say that this rule is either arbitrary or capricious, and I cannot substitute my judgment for that of the Police Commissioner.

For the reasons heretofore stated, I hold that the Commissioner had the power to make the order and that it is a reasonable order.

Fourth: Was the dismissal of Heine and Duggan unauthorized and unreasonable, and should they be reinstated?

I have heretofore held that the order of the Commissioner was reasonable and that he had the authority to make the order. I have also held that the Court has no right or jurisdiction to substitute its judgment for the Commissioner's. The right to maintain discipline in the Police Department includes the right to punish a police officer for violation of the rules of the Department. It is not for the Court to say whether or not the punishment of Heine or Duggan was too severe. Its only jurisdiction is to determine whether or not there is sufficient competent evidence to sustain the findings of the Trial Board.

General rules of evidence and procedure as apply in a trial at law, do not govern the hearings of the Trial Board to determine charges against a police officer. In *Aller v. Detroit Police Department Trial Board,* 309 Mich. 382, the Court said:

> "Law and order can only be maintained in the hands of police officers who are, in the opinion of

> their superiors, fit and proper persons to administer and enforce the law. Such responsibility should not be curtailed or circumscribed by insistence upon the application in each instance of technical rules as to admissibility of proof, even though the finding of fact by the board must be 'supported by evidence.' On the other hand, the police trial boards should be free to work out their own rules of procedure and pursue such methods of inquiry that will permit them to adequately discharge their responsibilities to the public. The rules of fair play in such instances are of far more importance to the public and the police officers concerned than is the application of strict legal procedure.''

I have examined the evidence that was placed before the Trial Board and find that there was sufficient competent evidence to sustain the Trial Board's findings.

For reasons herein stated, a decree may be entered dismissing plaintiffs' bill of complaint.

Signed—Frank B. Ferguson,
Circuit Judge.

Dated: May 9, 1945.

RESPONDENTS' APPENDIX E

STATE OF MICHIGAN—SUPREME COURT

Filed May 16, 1947

STATE LODGE OF MICHIGAN, FRATERNAL ORDER OF POLICE, a Michigan Non-profit corporation, VICTORY LODGE No. 115, FRATERNAL ORDER OF POLICE, an unincorporated voluntary association; HOWARD HEINE, BERNARD L. DUGGAN and HENRY MIDA,

Plaintiffs and Appellants,

v.

CITY OF DETROIT, a Municipal Corporation; EDWARD J. JEFFRIES, Mayor of the City of Detroit; JOHN H. WITHERSPOON, Commissioner of Police of the City of Detroit, County of Wayne and State of Michigan; LOUIS L. BERG, Superintendent of Police of the City of Detroit, County of Wayne and State of Michigan,

Defendants and Appellees.

OPINION

Before the Entire Bench
Reid, J.

By their bill of complaint plaintiffs sought to have declared null and void an order of the police commissioner of the city of Detroit dated June 5, 1919, forbidding Detroit police officers to become members of the Fraternal Order of Police, and also sought an injunction restraining defendants from carrying into effect such order or any order of similar purport; plaintiffs further sought to have declared void an order in February 1943, discharging plaintiffs

Heine and Duggan as police officers of the city of Detroit. Plaintiffs appeal from a decree of the circuit court for the county of Wayne dismissing their bill.

Involved in this case is the reasonableness of the order of the police commissioner of the city of Detroit, prohibiting the members of the Detroit police force from becoming members of a local organization of the State Lodge of Michigan, Fraternal Order of Police, and whether the order prohibiting such membership violated the constitutional rights of assembly, guarantee of equal privileges and immunities, and of equal protection of the laws.

Defendants claims that the questions involved are whether the rule of June 5, 1919, prohibiting membership in the Fraternal Order of Police was a valid exercise of authority by the police commissioner in view of the constitution and by-laws of the national, State and local lodges, and has the police commissioner authority to pass such prohibitory rule based upon the history, past conduct and leadership of the Fraternal Order of Police, and whether the action of the police commissioner was a reasonable exercise of authority when we consider sale of associate memberships and car emblems as matters contrary to public policy. Defendants further contend that the two plaintiff police officers had a fair hearing before the trial board, at which hearing they were found guilty of insubordination, and that the court ought not to set aside the order of dismissal where there is competent evidence to sustain the findings of the trial board.

On June 5, 1919, James Inches, then commissioner of police of the city of Detroit, issued an order forbidding police officers of his department to become members of plaintiff Fraternal Order of Police. Defendant John H. Witherspoon was commissioner of police of the city of Detroit from June 1, 1942, until his resignation, January 1, 1944,

and while he was commissioner and before January 1, 1943, had occasion to investigate the Fraternal Order of Police and its activities. He examined the file of his office respecting the plaintiff order and discussed the file with officers in the city of Detroit police department and with police officers in other police departments.

On Thursday, January 28, 1943, a group of Detroit police officers, including two plaintiffs, patrolman Howard Heine and detective Bernard L. Duggan, attended a dinner meeting in Detroit, at which there were also present a number of police officers, including representatives of the Hamtramck lodge of Fraternal Order of Police, Henry Mida of the Dearborn police department, and president of the State Lodge, Fraternal Order of Police, and also a reporter from the Detroit Free Press. A temporary organization was set up with Heine as temporary president and Duggan as temporary secretary. This meeting was without the knowledge of defendant Witherspoon. An account of the meeting was published in the Detroit Free Press the evening of January 29, 1943. The next morning plaintiff Heine was summoned to police headquarters to a meeting with defendants Witherspoon and Berg, the latter being superintendent of police of the city of Detroit. A transcript of the stenographic minutes of the meeting appears in the record. At that meeting Heine related the circumstances of the Thursday meeting, denied that he knew of the existence of Commissioner Inches' order prohibiting membership in the Fraternal Order of Police; stated that he had been advised that membership in the organization was contrary to the orders of the police department but that he had allowed himself to be elected president. Plaintiff Heine was then given a copy of Inches' order, whereupon he said that if the Fraternal Order of Police was permitted to organize in the police department he would join it but if not, he would not join, and that he would pull out of the organization, and

also stated that no new meeting was contemplated and that the organization intended to present the matter to the commissioner for permission to organize. Upon leaving this meeting, plaintiff Heine went directly to the Eagles Hall in Detroit, where a secret organization, initiation and election meeting was held. Heine was elected permanent president and plaintiff Duggan, secretary. On February 1, 1943, Duggan was summoned to police headquarters before defendant Witherspoon. A transcript of the stenographic minutes taken at that meeting appears in the record. Duggan refused to reveal any information relative to the meeting held on January 28, 1943, on the ground that this meeting was a secret meeting. He said he knew of the rule prohibiting membership in the Fraternal Order of Police but he joined nevertheless because he figured the rule was wrong and he was willing to be the "guinea pig" in a test case. He admitted being on duty from 8 to 4 of a day when he attended a meeting of the Fraternal Order of Police at 3 o'clock, without having first obtained permission to leave his work prior to the end of his shift.

On February 2, 1943, charges of misconduct were preferred against Heine, charging disobedience of rules and orders of the department, reporting falsely to a superior officer and insubordination. On the same day similar charges were preferred against Duggan, with the additional charge of being absent without leave. Both officers were ordered to appear before the police trial board on February 5, 1943, to answer the charges. The transcripts of the trials before the police trial board are in the office of the clerk of this court. Neither plaintiff Heine nor plaintiff Duggan took the stand to offer any testimony in their own defense and neither of them offered to withdraw from the Fraternal Order of Police. At the trial of plaintiff Heine, which occurred February 5, 1943, there was sufficient testimony produced to show that on January 30, 1943, Heine,

with knowledge of the Inches' order of 1919, promised the defendants Witherspoon and Berg that no further meetings of the Fraternal Order of Police were contemplated while there was an order prohibiting membership in the Fraternal Order of Police and also promised defendants that nothing further would be done until the matter could be presented to the commissioner in an orderly manner for a change in the rule. Notwithstanding this conversation plaintiff Heine thereafter had gone directly from police headquarters to the organization meeting of the local Fraternal Order of Police, and permitted himself to be initiated and to be elected permanent president. The trial of plaintiff Duggan was on February 6, 1943. Plaintiff Duggan had been brought before the commissioner on February 1, 1943, had told the commissioner that he believed the rule was wrong and that he was going to remain a member notwithstanding the rule. Both plaintiffs Heine and Duggan were promptly found guilty of insubordination and were dismissed from the department.

The record in this case shows that at the time of the discharge of the two plaintiffs the Fraternal Order of Police was substantially the same kind of an organization that it was as described in the case of *Fraternal Order of Police v. Lansing Board of Police & Fire Commissioners,* 306 Mich. 68. In that case we said, p. 80:

> "The constitution and by-laws of plaintiff's national, state and local organizations which were received in evidence provide in effect that citizens may become associate members upon payment of dues of not less than $5 per year, and such associate members will be furnished 'a membership card' and car 'emblem.' One would be naive, indeed, to assume that such automobile emblem did not carry with it the intimation of special privileges to associate members. This of itself is enough to require the determination that the existence of plaintiff organiza-

tion within the law-enforcement body of a municipality is contrary to public policy."

On the trial of this cause, March 28, 1945, plaintiffs offered some showing to the effect that the bylaws of the Detroit lodge, Fraternal Order of Police, banned associate memberships and sale of car emblems. Defendant Witherspoon testified that the first time that he learned of such a prohibition in the bylaws of the local lodge was at the trial in question in March, 1945. However, the following statements were made by witness Duggan, February 1, 1943, in an interview before defendant Commissioner Witherspoon:

"Q. You said at one time in describing the nature of this organization that you thought it was a good organization because the membership was restricted to police officers?

A. Right.

Q. Is that your understanding of the organization?

A. Well, they have what is called associate membership.

Q. That doesn't disturb you—you think that is perfectly proper?

A. Well, that's a matter to be used with circumstances. If they take in men that put you in the middle, that's something not to permit.

Q. They do permit them?

A. Well, they do have provision for associate members."

The supposed amendments to the constitution, excluding associate members, and forbidding the sale of car emblems, if such amendments were ever actually made at all, must have been effectuated after the discharge of plaintiffs Heine and Duggan.

However, there is nothing in this record doing away with the force and effect of the undisputed showing that both

plaintiffs Heine and Duggan were guilty of insubordination. We reiterate what was said by Justice Bushnell and those who concurred in his opinion in the case above cited, quoting from *Carter v. Thompson,* 164 Va. 312 (180 S. E. 410):

> "Police and fire departments are in a class apart. Both are at times charged with the preservation of public order, and for manifold reasons they owe to the public their undivided allegiance. The power in the city of complete control is imperatively necessary if discipline is to be maintained."

The defendant commissioner is necessarily vested with a large measure of discretion and the burden of showing arbitrary action is upon those who charge it. Plaintiffs have not met such burden.

The order promulgated by the police commissioner of the city of Detroit is considered to be within the scope of the authority granted under the charter of the city of Detroit, and cannot be said to be arbitrary or unreasonable. The plaintiffs are not deprived of any constitutional right.

The decree dismissing plaintiffs' bill of complaint is affirmed. A question of public importance being involved, no costs are allowed.